The Bench Again Meets the Bar

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INTRODUCTION

As an integral and well-established feature of the Judicial Conferences held by the Court of International Trade over the past several years, the Bench has accorded the Bar, and indeed all those in attendance, the opportunity to discuss from several facets questions that are both timely and on which focus is properly attendant. This year’s Conference is no exception. Our panel of Judges includes Judges Donald Pogue, Evan Wallach and Judith Barzilay and Senior Judge Nicholas Tsoucalas. Inasmuch as I have practiced for well over 30 years before the Court, and indeed its predecessor, I readily agreed to participate with these distinguished jurists in raising before you a number of topics that we trust will strengthen the dialogue that has been initiated by others and will continue to advance the joint mission of both the Bench and the Bar.

The above having been said, I intend to propose the following for consideration by these four jurists during the course of the Judicial Conference:

I. DISCOVERY RULES

Over the past two years, the Court’s Advisory Committee has had occasion to review and recommend to the Court numerous changes regarding the role that Discovery plays in the litigation process. Beginning this year, we have a new set of Discovery

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II. EXPERT WITNESS TESTIMONY

Being a court of limited jurisdiction, the Court of International Trade relies in many instances on the use of expert witness testimony. A question that many practitioners have raised, and which will be of obvious benefit to the practitioners in this audience, can be addressed if we focus on the use of expert witness testimony in light of the decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). I think it will be highly instructive to solicit their views on who really is an "expert" and whether persons having a great number of years in a particular venture or effort can be as persuasive as an expert in helping influence a decision.

III. ORAL ARGUMENT

In many respects, oral argument is an art form in and of itself. I believe all those present will benefit from understanding from each of these distinguished jurists exactly what he or she believes oral argument is all about and what a practitioner should focus on in either asking for, or actually appearing at the occasion of, oral argument. Attention in this respect can also be given as to how oral argument might be improved. In this latter regard, I believe a number of the Judges have made it their practice to provide counsel with specific questions prior to
argument. The issue is obviously a timely one, and I believe we will benefit greatly from the Court's views.

IV. REVISIONS TO CHAMBER'S PROCEDURES

Many of the Judges on the Court have now published, and in some cases revised, Chamber's Procedures. I know from my service on the Advisory Committee that a number of additional changes are in the offing. As a long-term practitioner, I can only comment that the Bar stands to benefit from uniformity. It is important, therefore, that the practitioners understand how each of today's panelists views the subject of Chamber's Procedures and what the Bar can expect.

V. BENCH AND BAR CONFERENCES

Last November, the Court sponsored a Bench and Bar Conference during which a number of practitioners, both within and without government, had an opportunity to meet with many of the members of the Court. As one of the attendees, I found the session highly productive. I do not believe I would be speaking out of school if I reported my sense that the Court has "paid attention" in a number of the areas in which a dialogue has been started. I am interested, therefore, in the views of today's panelists on how the relationship and dialogue between the Bench and the Bar can be strengthened and continued.

VI. PRESENTATION ADVICE FOR ATTORNEYS

While litigation lies at the heart of practice before the Court of International Trade, over the past several years, we have seen a diminution in the number of cases that have actually gone to trial. For many of the persons attending this Judicial Conference, this will represent the only opportunity they have to see or hear directly from a sitting judge. My question for each of you is a simple one:

What advice would you give for a lawyer to be more effective in his or her presentation?

As a necessary corollary, is there any particular point you wish to emphasize regarding the briefing of cases?
VI. BENCH RULINGS

A number of practitioners have expressed interest in the use of Bench rulings. I am assuming, of course, that we are not speaking of objections that may be advanced with the Court's obvious need to rule on the spot as to whether the objection is valid or whether testimony can proceed. Rather, I sense this question has been raised with the expectation that the cost of litigation could be reduced if the Court had reached a decision and really felt that post-hearing briefs would not necessarily help in its formulation of the requisite findings of fact and conclusions of law. Any thoughts on this possibility?

VIII. EXPANSION OF JURISDICTION

A number of proposals are presently being considered regarding possible expansion of the Court's jurisdiction. I would like to focus on two of these during the occasion of this year's Judicial Conference. The first has to do with a possibility of creating a small claims docket. In the alternative, I would be interested in the panel's reaction to the elimination or amelioration of the "irreparable harm" rule under 28 U.S.C. § 1581(h).

IX. POTENTIAL ALTERNATIVES TO LITIGATION

As a corollary to the above, do you have any thoughts regarding potential alternatives to full-blown litigation such as mediation and the role that it might play in the future?

X. SANCTIONS

Finally, I would be somewhat remiss if I did not raise an issue that has come to the fore over the past several months and can best be summed up under the rubric of "sanctions." From the Bar's perspective, the threat of the imposition of civil or judicial sanctions, be it under Rule 11 or otherwise, represents a very real threat to an attorney's meal ticket. I sense that the Bar, through organizations such as CITBA, can do its part to ensure that all attorneys practicing before the Court are aware of the standards the Court expects as well as put together a list of "do's
and don'ts." It would be particularly instructive at today's Judicial Conference to hear from each of you on the issue of sanctions, whether you sense there is a trend in any one particular direction and what forms of conduct you think might best be included on a checklist that CITBA or any other organization may put together in formulating its agenda on this point.

CONCLUSION

On behalf of all those attending this year's 12th Judicial Conference, may I personally extend our thanks to the Judges of the Court of International Trade for participating in this endeavor and sharing highly valuable insights into these questions of mutual interest and concern.